

RESALE PRICE MAINTENANCE IN THE DIGITAL AGE

EUROPEAN COMMISSION ISSUES ITS FIRST RESALE PRICE MAINTENANCE DECISIONS IN OVER A DECADE FINING FOUR CONSUMER ELECTRONICS MANUFACTURERS FOR FIXING ONLINE RESALE PRICES - MONITORING SOFTWARE AND PRICING ALGORITHMS PLAYED A ROLE.

On 24 July 2018, the European Commission ("Commission") fined, in four separate decisions, consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices on their online retailers. The total fine imposed on the four manufacturers amounts to more than EUR 111 million.

The infringements related to a variety of consumer electronics such as kitchen appliances, notebooks and hi-fi products. The four manufacturers were found to have intervened with online retailers who offered their products at low prices. If those retailers did not respect the prices requested by the manufacturers, they faced – according to the decisions – threats or sanctions such as blocked supplies. Pioneer had also limited the ability of its retailers to sell cross-border to consumers in other Member States in order to sustain different resale prices in different Member States.

Resale price maintenance issues as such are not new. The four Commission decisions imposing substantial fines on the consumer electronics manufacturers are nevertheless highly relevant, in particular for businesses engaging in e-commerce.

The Commission's press release highlights that monitoring software and pricing algorithms played an important role in the assessment of the cases although the use of these tools in itself was not found to infringe EU competition law:

- First, the Commission found that the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale prices and to intervene swiftly in case of deviations from the imposed prices.
- Secondly, the Commission emphasized that the resale price restrictions imposed on certain online retailers had a broader impact on the overall online price level in the industry as most online retailers use pricing algorithms which automatically adapt retail prices to those of competitors.

As to the level of fines, the Commission granted reductions ranging from 40% to 50% as the four companies had provided evidence with significant added value and had expressly acknowledged the facts and the infringement. This is interesting as the Commission's leniency and settlement procedures, which both provide for reductions of fines, are limited to horizontal cartels and do not apply to vertical restraints such as resale price maintenance. The Commission nevertheless granted reductions of fines in the present vertical cases to reward the companies' cooperation.

The Commission decisions mark the first time the Commission has issued a decision addressing resale price maintenance in more than a decade (for the past years, the Commission had left the enforcement of resale price maintenance and other vertical restraints to the national competition authorities). The four decisions follow the Commission's comprehensive e-commerce sector inquiry, the results of which were published in May 2017 and have led the Commission to open a number of investigations into online sales practices. Besides the four decisions issued on 24 July 2018, further investigations are ongoing and concern geo-blocking practices, price discrimination based on consumers' locations and restrictions of cross-border and online sales of merchandising products.

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